

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CELERINO CARRASCO,

Plaintiff,

V.

CORRECTIONAL SERVICE
CORPORATION, *et al.*,

Defendants.

Case No. C06-5084RJB

REPORT AND RECOMMENDATION

Noted for March 9, 2007

This § 1983 Civil Rights matter has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. This matter comes before the court on Plaintiff's response to the court's Order dated January 5, 2007. For the reasons set forth below, the undersigned recommends dismissal of this lawsuit without prejudice for failure to properly serve the complaint on defendants.

PROCEDURAL AND FACTUAL BACKGROUND

This matter was initiated by Plaintiff on or about January 30, 2006, when the Court Clerk received four different proposed complaints (Docs.1& 2). At the time Plaintiff was an immigration detainee in custody at the Northwest Detention Center. A few days later the Court Clerk received two more proposed complaints (Doc. 4 &5), along with a list of fourteen defendants (Doc. 6), and two applications to proceed *in forma pauperis*. (Doc. 12 & 13).

On February 15, 2006, the Clerk sent Plaintiff a letter explaining that his applications to proceed *in*

1 *forma pauperis* were deficient, (Plaintiff failed to file the required Written Consent for Payment of Costs).
2 Plaintiff attempted to correct the deficiency, and on May 1, 2006, the undersigned reviewed the matter.
3 The court explained that the information Plaintiff provided to court to support his applications was
4 inconsistent. The court noted Plaintiff's application failed to disclose any source of income while he was
5 detained at the Northwest Detention Center, but the detention center's financial record indicated that he
6 regularly received monies, which were deposited in his account. The court further noted that Plaintiff was
7 no longer in custody, but had been deported to Mexico on or about February 28, 2006.

8 Due to the fact that Plaintiff's applications for IFP were deficient and incomplete and because Plaintiff
9 was no longer in custody, but a free individual, the court concluded it should not impose the *in forma pauperis*
10 laws applicable to those that are in custody pursuant to 28 U.S.C. § 1915. The court directed plaintiff to either
11 pay the requisite filing fee of \$250.00 or file an updated application to proceed in forma pauperis, based on his
12 current income and/or employment status in Mexico.

13 On May 31, 2006, in response to the court's order, Plaintiff filed an updated application to proceed *in*
14 *forma pauperis*. The application was presented on the form used for prisoners, but nonetheless, the court
15 reviewed the statements in the application, and on July 19, 2006, the undersigned granted his application.
16 The court explained Plaintiff's responsibilities to proceed with the case, stating:

17 The clerk is directed to issue summonses, after submitted by plaintiff, to enable plaintiff to
18 properly serve copies of the complaint on each of the named defendants. Plaintiff, who is no
19 longer incarcerated or in custody, shall note that it is his responsibility to properly serve
copies of the complaint along with appropriate summons as required by Rule 4 of the
Federal Rules of Civil Procedure.

20 Doc. 23. On July 20, 2006, Plaintiff filed an Amended Complaint (Doc. 24).

21 Several months passed and on October 30, 2006, the undersigned reviewed the file to determine the
22 status of the case. It did not appear that Plaintiff had ever requested the Court Clerk to issue the
23 appropriate summonses and Plaintiff had not filed any proof of service of the complaint, thus, the court
24 issued an order allowing Plaintiff the opportunity to either perfect service or explain why more time to
25 allow for service should be granted (Doc. 27). Plaintiff failed to respond to the court's order, and the
26 undersigned recommended dismissal of the matter (Doc. 28).

27 On December 26, 2006, without knowledge of any objections filed by Plaintiff to the
28 recommendation, the Court adopted the court's recommendation to dismiss this matter for failure to

1 prosecute (dismissing the case without prejudice). However, on December 29, 2006, the Court Clerk
 2 docketed two declarations submitted by Plaintiff on December 21, 2006. The Court considered Plaintiff's
 3 declarations as an attempt to show that he has properly served summonses and copies of the complaints on
 4 the named defendants, and it referred the matter back to the undersigned magistrate judge.

5 On January 5, 2007, the court reviewed the matter, specifically the declarations filed by Plaintiff on
 6 December 21, 2007, and issued an order to show cause why the matter should not be dismissed for failure
 7 to properly serve each defendant with a summons and copy of the complaint. In addition, the court
 8 explained that the Amended Complaint was deficient. Specifically, the court noted that the Amended
 9 Complaint did not appear to name proper defendants. The court noted that the Amended Complaint
 10 named different individuals than the individuals Plaintiff was attempting to serve. Furthermore, the court
 11 explained that the Amended Complaint did not specifically name individuals who personally participated in
 12 depriving plaintiff of any U.S. Constitutional or federally protected rights. Plaintiff was directed to file
 13 proof that the summonses and copies of the complaint have been properly served and a second amended
 14 complaint, curing, if possible, the deficiencies noted by the court regarding proper defendants and personal
 15 participation. See Doc. 33.

16 On February 5, 2007, the Court Clerk received a pleading from Plaintiff entitled, "Proof certify of
 17 service receipts and objection against order of dismissal." After reviewing this document, and the balance
 18 of the record, the undersigned submits this report, recommending dismissal of this matter for lack of
 19 prosecution and frivolity.

20 DISCUSSION

21 A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745
 22 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a
 23 complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before
 24 service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing*
 25 Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)). A plaintiff must allege a deprivation of a
 26 federally protected right in order to set forth a *prima facie* case under 42 U.S.C. § 1983. Baker v.
 27 McCollan, 443 U.S. 137, 140 (1979). In order to state a claim under 42 U.S.C. § 1983, a complaint must
 28 allege that (l) the conduct complained of was committed by a person acting under color of state law and

1 that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
 2 laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*,
 3 Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged
 4 wrong only if both of these elements are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir.
 5 1985), *cert. denied*, 478 U.S. 1020 (1986). Section 1915(e) of the PLRA requires a district court to
 6 dismiss an in forma pauperis complaint that fails to state a claim. 28 U.S.C. § 1915; Barren v. Harrington,
 7 152 F.3d 1193, 1194 (9th Cir.1998).

8 Rules 4 of the Federal Rules of Civil Procedure govern how and when service of a summons and a
 9 copy of the complaint is required to properly commence a civil action. Rule 4(c)(2) of the Federal Rules of
 10 Civil Procedure clearly states that service of a summons shall be served together with copy of the
 11 complaint and the plaintiff is responsible for service of a summons and complaint within the proper time
 12 period. Rule 4(c). The rule further states that service “may be effected by any person **who is not a party**
 13 and who is at least 18 years of age” (emphasis added). Exceptional steps must be taken to perfect service
 14 when the defendant is a corporation, association, the U.S. government or governmental agencies. See
 15 Rules 4(h), 4(i), and 4(j). In relevant part, FRCP 4(m) provides:

16 Time limit for service. If service of the summons and complaint is not made upon a
 17 defendant within 120 days after the filing of the complaint, the court, upon motion or upon
 18 its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to
 19 that defendant or direct that service be effected within a specified time; provided that if the
 20 plaintiff shows good cause for the failure, the court shall extend the time for service for an
 21 appropriate period.

22 Rule 4(l) states, in relevant part, “If service is not waived [a procedure described in rule 4(d)] the person
 23 effecting service shall make proof thereof to the court.”

24 After carefully reviewing the standards set forth above and Plaintiff’s pleadings made in response to
 25 the court’s concerns that a copy of the Amended Complaint along with a summons have not been properly
 26 served on each defendant, the undersigned finds Plaintiff’s most recent documents and pleadings filed on
 27 February 5, 2007, do not contain any kind of proof to suggest otherwise. The statements made by Plaintiff
 28 show that he had receipts for sending something to Tacoma, Washington on September 23, 2006, allegedly
 addressed to G.C. Wigen and C. Cheek at Correctional Service Corporation. This does not provide
 sufficient proof that defendants received an appropriate summons, issued by the Court Clerk, along with a
 copy of the Complaint and/or Amended Complaint.

1 The fact that Plaintiff is proceeding *in forma pauperis* does not relieve him of the duty to serve
 2 summonses and copies of his complaint on defendants. Rule 4(c)(2) provides the option of allowing a
 3 plaintiff to request that service be made by the U.S. Marshall, deputy Marshall, or other person or officer
 4 specially appointed by the court, and that "Such appointment must be made when the plaintiff is authorized
 5 to proceed *in forma pauperis* pursuant to 28 U.S.C. §1915 or is authorized to proceed as a seaman under
 6 28 U.S.C. §1916." Since passage of the Prisoner Litigation Reform Act ("PLRA") 28 U.S.C. § 1915
 7 specifically pertains to prisoners proceeding in forma pauperis. Thus § 1915(d) which states, "The officers
 8 of the court shall issue and serve all process, and perform all duties in such cases" does not apply here. At
 9 the time Plaintiff submitted his initial complaints, he was an immigration detainee; he was never a prisoner.
 10 At the time his application to proceed in forma pauperis was granted, he was living and residing in Mexico
 11 without any of the restrictions or limitations the court would normally assign a prisoner litigant (or a
 12 seaman). There are at least two Ninth Circuit cases that hold specifically that an immigration detainee
 13 who is not facing criminal charges is not a "prisoner" under the PLRA. *See Andrews v. King*, 398 F.3d
 14 1113 (9th Cir. 2005) (noting that in *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002) it had held that an
 15 INS detainee who does not also face criminal charges is not a prisoner under 28 U.S.C. §1915).

16 Local Rule CR 4(c) supplants the federal rule to certain extent. Local Rule CR 4(c) provides:

17 Except as provided for herein, the United States Marshals Service is relieved from any and
 18 all civil process serving responsibilities within this district on behalf of private litigants. The
 19 private litigant or attorney of record for the private litigant shall make appropriate
 20 arrangements with a person authorized to serve process. Upon order of this court or
 21 pursuant to an express statutory provision, however, the United States Marshals Service
 22 shall make service of civil process on behalf of a private litigant or his attorney or record.

23 The undersigned is unaware of any express statutory provision that would apply in this case where Plaintiff
 24 is a private litigant who happens to now reside in Mexico. He is responsible for properly serving a
 25 summons and copy of his complaint or amended complaint on each of the defendants named. As noted
 26 above, Plaintiff has failed to file sufficient proof of service in this matter.

27 The Amended Complaint fails to allege with sufficient specificity any violation of U.S.
 28 Constitutional or federally protected rights. Plaintiff discusses the fact that he was engaged in a fight with
 another inmate, but fails to state or show how any individual, acting under color of state law, intentionally
 or recklessly allowed the fight to occur. Plaintiff makes further allegations that the fight or incident was
 not properly investigated. These statements do not show or support any cognizable § 1983 claim.

1 The court notes that Plaintiff contends he has properly attempted to serve two individuals, G.C.
2 Wigens and C. Cheek, at the Correctional Service Corporation, located in Tacoma, Washington. A review
3 of the Amended Complaint shows that neither of these individuals is named in the caption of the document,
4 nor in the space provided to name further individuals, where Plaintiff names the United States Government
5 as an additional defendant. See Doc. 24 at 3. The court notes that Plaintiff mentions Associated Warden
6 Cheek in the Statement of Claim portion of the Amended Complaint, but it is clear that such individual is
7 named only in his or her supervisory capacity. As explained in the court's order to show cause, dated
8 January 5, 2007, a defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of
9 supervisory responsibility or position. Monell v. New York City Dept. of Social Services, 436 U.S. 658,
10 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. Padway v.
11 Palches, 665 F.2d 965 (9th Cir. 1982). Plaintiff has failed to address this deficiency or similar deficiencies
12 as directed by the court.

CONCLUSION

14 Based on the foregoing, the Court should dismiss this matter without prejudice for failure to
15 properly serve defendants with a summons and copy of the complaint, or the Court should dismiss this
16 matter with prejudice because Plaintiff has failed to state any cognizable claim against any individual
17 personal participant.

18 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
19 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P.
20 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.
21 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to
22 set the matter for consideration on **March 9, 2007**, as noted in the caption.

23 DATED this Monday, February 12, 2007.

25 /s/ J. Kelley Arnold
26 J. Kelley Arnold
United States Magistrate Judge